

3
No. 90-416

Supreme Court, U.S.
FILED

OCT 22 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROCCO DILEO and LOUISE DILEO,

Petitioners,

vs.

ERNST & YOUNG,

Respondent.

On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

ARTHUR T. SUSMAN

Counsel of Record

SUSMAN, SAUNDERS & BUEHLER

Two First National Plaza

Suite 620

Chicago, Illinois 60603

(312) 346-3466

MICHAEL P. MYERS

JOSEPH AND MYERS

33 North Dearborn Street

Suite 1410

Chicago, Illinois 60602

(312) 346-9887

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 221-0220

BEST AVAILABLE COPY

No. 90 - 416

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROCCO DiLEO and LOUISE DiLEO,

Petitioners,

vs.

ERNST & YOUNG,

Respondent.

On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

A.

The petition for certiorari seeks resolution by this Court of a conflict among circuits as to whether pleading scienter generally is sufficient, or whether, as was held below, one must plead facts supporting an inference that defendant acted with the requisite mental state. The issue arises in the context of a claim brought under Section 10(b) of the Securities Exchange Act. The complaint alleges that respondent, knowingly or recklessly, certified fraudulent financial statements.

Respondent's brief argues that the issue of whether the complaint adequately pleads state of mind arises in "the context of secondary liability". (Res. Br. 7) Respondent seriously misreads the decision of the Court of Appeals. The decision makes clear that the court considered pleading scienter in connection with a claim that respondent is primarily liable. The decision opens its discussion of scienter at App. 8, stating, "[m]oreover, the complaint offers no reason to infer that E&W possessed the mental state necessary for a *primary* violation." [Emphasis added.]

Careful reading makes it obvious that the decision of the Court of Appeals requires that a claim for *primary* liability under §10(b) plead facts from which "an *inference* of scienter" may be drawn. (App. 10) The petition for certiorari seeks resolution of a conflict among circuits concerning the standard for pleading scienter in connection with a claim asserting primary liability. It does not involve special pleading rules pertaining to alleging secondary liability under the securities laws as argued in respondent's brief. (Res. Br. 8-10)

B.

Respondent's brief raises the specter of unresolved questions concerning secondary liability in an attempt to make the granting of the petition for certiorari appear imprudent. At page 8, respondent's brief states:

We note that the Court would initially have to decide the substantive issue, twice specifically reserved by the Court, of whether there is aiding and abetting liability at all under §10(b) of the Securities Exchange Act and Rule 10b-5.

Secondary liability is not an issue raised in this petition. The complaint alleges that respondent falsely certified finan-

cial statements. By that conduct respondent made untrue statements of material fact and failed to state material facts. The certifications' fraudulent assertions that Continental's financial statements accurately reflected its financial condition and the results of its operations constitute primary violations under Section 10(b). It is that respondent made fraudulent statements of which petitioners complain; the question of whether respondent had a duty to disclose is not here at issue. (Res. Br. 8)

C.

Respondent's brief characterizes the issue presented by the petition for certiorari as a problem of applying accepted legal standards to the allegations in the complaint. Respondent states:

No question of law, much less conflict among the circuits, is presented, but only the application of established principles to these particular allegations. (Res. Br. 2)

Respondent's position is incorrect. Rule 9(b) requires pleading circumstances of fraud with particularity; the decision below demands that a complaint plead evidence.

The complaint sets forth the "circumstances" of the conduct complained of with "particularity". It alleges far more than "that Continental did not increase its reserve for bad loans quickly enough." (Res. Br. 3) It states that respondent certified two fraudulent financial statements; it identifies those financial statements; it designates the categories of assets, liabilities and income items which were misstated; it quantifies the misstatements; and it lists accounting standards which respondent violated. It does set forth the "who, what, when, where and how" of respondent's fraud. (App. 5)

What the complaint does not do, and the reason that it was dismissed by the Seventh Circuit, is plead evidence. It does not “give examples of problem loans”. (App. 4) Rule 9(b) requires pleading “circumstances” of fraud with “particularity”. The court below has perverted that requirement, and has made the pleading of evidentiary details a prerequisite to stating a claim for fraud.

CONCLUSION

This Court should give guidance in two critical areas never addressed by it in the more than 50 years since Rule 9(b) has regulated pleading in the federal system and about which grave conflicts exist.

Respectfully submitted,

ARTHUR T. SUSMAN

Counsel of Record

SUSMAN, SAUNDERS & BUEHLER

Two First National Plaza

Suite 620

Chicago, Illinois 60603

(312) 346-3466

MICHAEL P. MYERS

JOSEPH AND MYERS

33 North Dearborn Street

Suite 1410

Chicago, Illinois 60602

(312) 346-9887

Attorneys for Petitioner

October 22, 1990

